Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1994

ANGEL YUH WILLIAMSON, M.D.,
PENSACOLA DIAGNOSTIC & BREAST CLINIC, P.A.,

Petitioners,

v.

SACRED HEART HOSPITAL OF PENSACOLA,
BAPTIST HOSPITAL, INC.,
PENSACOLA RADIOLOGY CONSULTANTS, P.A.,
ALBERT A. POST, M.D. and
KEITH T. SHEARLOCK, M.D.,
HEALTH FIRST NETWORK, INC.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In determining whether a plaintiff's antitrust conspiracy claim should survive summary judgment, may the court weigh competing evidence on the defendants' motives?

II. Whether a plaintiff whose profits have increased since filing suit, as a matter of law, has no standing to file an action for damages under the antitrust laws.

INTERESTED PARTIES

The following persons and entities have or may have an interest in the outcome of this case:

Baptist Hospital, Inc

Beggs & Lane
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Pensacola Diagnostic & Breast Clinic, P.A.

Pensacola Radiology Consultants, P.A.

Albert A. Post, M.D.

Sacred Heart Hospital of Pensacola

Keith T. Shearlock, M.D.

Angel Yuh Williamson, M.D.

Michael Williamson, M.D.

STATEMENT OF PARENT, SUBSIDIARY AND AFFILIATE CORPORATIONS

Pursuant to Supreme Court Rule 29.1, Pensacola Diagnostic Center and Breast Clinic, P.A. has no parent, subsidiary, or affiliated corporations.

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OPINIONS BELOW

Petitioners seek review of the unreported opinion of the Eleventh Circuit Court of Appeals, *Williamson v. Sacred Heart Hospital of Pensacola*, 41 F.3d 667 (11th Cir. 1994). That opinion appears in the Appendix to this petition at A3.[1] The United States District Court for the Northern District of Florida issued two separate opinions, one granting and one denying the motions for summary judgment. The two opinions, neither of which were reported, appear in the Appendix at A16 and A54.

JURISDICTIONAL GROUNDS

Pursuant to 28 U.S.C. § 1254(1), petitioners Angel Yuh Williamson, M.D. and Pensacola Diagnostic Center and Breast Clinic, P.A. (collectively "Dr. Williamson") file this Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals seeking review of the court's November 18, 1994 decision affirming the district court's grant of summary judgment to the defendants on Dr. Williamson's Sherman Act and state law claims. Dr. Williamson's timely petition for rehearing was denied on January 9, 1995 and the Eleventh Circuit's mandate issued on January 23, 1995.

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[1] Citations to the attached Appendix are designated as "A___."

RELEVANT STATUTES

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.

Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1.

INTRODUCTION

This antitrust case presents important issues regarding proof of conspiracy and standing that have troubled and divided the lower courts. Dr. Williamson opened a diagnostic center and breast clinic that gave Pensacola women and their physicians new options in the early diagnosis and treatment of breast cancer. In this action brought under the Sherman Antitrust Act, Dr. Williamson and her clinic allege that her biggest competitors entered into a conspiracy to make it difficult, if not impossible, for Dr. Williamson's clinic, and other independent clinics like hers, to compete against hospital-based radiology departments.

The defendants filed the usual motions for summary judgment, contending that Dr. Williamson had not presented sufficient evidence of conspiracy to reach the jury. In two lengthy and conflicting orders, the district court first denied (A16) and then granted summary judgment (A54). The Eleventh Circuit affirmed the second order (A3).

This case presents the Court with an opportunity to resolve conflicting decisions among the circuits on the quantum

of evidence necessary to survive summary judgment in antitrust conspiracy claims based on circumstantial evidence. Dr. Williamson presented competent substantial evidence below that the defendants conspired to attack her referral base and to deny her access to hospital facilities. Defendants concede that Dr. Williamson is highly qualified in her specialty. The evidence suggests that, acting alone, each defendant would have been eager to associate with Dr. Williamson. However, acting as a group the defendants could and did attack her practice by keeping her out of Pensacola's largest HMO. Defendants also denied her access to the most significant hospital facilities in Pensacola (defendants Sacred Heart and Baptist Hospitals), which prevented Dr. Williamson from rendering complete care to her patients. Finally, the defendants attacked her referral base by entering into highly improper and possibly illegal agreements with Dr. Williamson's core group of referral physicians. These agreements caused her new referrals from these physicians to drop drastically.

In response, the defendants submitted some evidence that their actions were consistent with unilateral action. Instead of acknowledging that this evidence created a factual issue for the jury, the Eleventh Circuit weighed the competing evidence on the defendants motives and ruled as a matter of law that the defendants' actions were consistent with their economic interests and that, therefore, summary judgment was required. The Eleventh Circuit's decision, like similar decisions in the Fourth, Eighth and Tenth Circuits, are in conflict with decisions of other circuits that forbid the weighing of conflicting evidence regarding the defendants' motives.

The Eleventh Circuit also ruled that Dr. Williamson had no standing to assert her antitrust claims. Again, the Eleventh

Circuit resolved factual issues that were rightfully for the jury. Dr. Williamson had evidence that the defendants' conspiracy was enormously successful. By attacking her referral base, the defendants quickly caught and then surpassed the success of Dr. Williamson's independent clinic. The impact on the market was dramatic. Despite the increasing popularity of independent radiology clinics around the country, not one such clinic opened in Pensacola after the conspiracy began. In fact, twenty-one new radiologists have come to Pensacola since Dr. Williamson opened her doors. All twenty-one have affiliated with hospital-based radiology groups. None joined an independent clinic like Dr. Williamson's. Dr. Williamson presented this evidence of injury to the market along with "dramatic" statistical evidence of the diversion of referrals from her clinic.

Despite this evidence of injury to the market and to Dr. Williamson's clinic, the Eleventh Circuit ruled as a matter of law that Dr. Williamson had no standing to bring an antitrust action because her clinic was profitable. This decision is in conflict with several other circuits and should be reversed.

The Eleventh Circuit's rulings on proof of conspiracy and standing threaten to destroy the effectiveness of private causes of action as a means for enforcing antitrust policy in the United States. This Court should grant certiorari to consider these important issues.

STATEMENT OF THE CASE AND FACTS

Dr. Williamson is a Pensacola radiologist, board certified in both diagnostic radiology and nuclear medicine (App. III at 1-2).[2] Defendants concede that Dr. Williamson is highly qualified in her specialty.

The New Breast Care--Dr. Williamson Opens Her Clinic

Dr. Williamson completed her residency and moved with her husband to Pensacola in 1983. Dr. Williamson joined an independent radiologist and soon began to focus her practice on the care and treatment of breast disease (App. II-34 at 31-34).[3] At about the same time Dr. Williamson began to practice, certain radiologists were beginning to promote a fundamental change in the traditional approach to breast care. Under the traditional approach, a woman would see a primary care physician such as a family practitioner or gynecologist who would refer the woman to a radiologist for a mammogram. At her scheduled radiology appointment, the patient typically would not see the radiologist and would receive no consultation of any kind. The radiologist would later send a report to the primary care physician. The patient would then await another

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[2] Much of Dr. Williamson's evidence is in the record in a three-volume appendix which appears in Volumes 11-309 and 12-311 of the record. References to these documents will be by Appendix volume number, tab number and page number.

[3] Breast cancer is one of the leading killers of American women. "Cancer Statistics, 1991," CA-A Cancer Journal for Clinicians, Vol. 41, No. 1 (January/February 1991) at 19-20. One in ten American women will develop breast cancer sometime in her life. In 1990 alone, some 44,000 women died in this country from the disease. Id. Early detection is critical. With early detection, over 90% of all breast cancers can be cured. Id.

appointment with her primary care physician to discuss the radiology report. More often than not, the primary care physician was not a specialist in the diagnosis and care of breast disease. If necessary, the primary care physician would then refer the patient to a surgeon who would do the biopsy necessary to complete the diagnosis. Thus, the patient would endure a minimum of four appointments and never be seen by a specialist in breast disease. These four appointments might take weeks or months to complete even though time is of the essence and the patient's anxiety level is at its highest (R. 15-354 at 2-3; App. I-4 at ¶¶ 5-10; App. I-13 at ¶¶ 19-20; App. I-8 at ¶22).

Dissatisfied with this lack of comprehensive and specialized treatment, a number of radiologists began to develop an alternative, more comprehensive, treatment of the breast patient. Upon self-referral or referral from a primary care physician, these radiologists would conduct patient histories and physical exams and perform the necessary diagnostic tests all in one visit. If referral to a surgeon is necessary, the referral could be made that day. Afterward, these radiologists remain in active consultation with the surgeon and coordinate the care received by the patient during her surgery and recovery (R. 15-354 at 2-3); App. I-8 at ¶23; App. I-13 at ¶20). Defendants do not dispute the many advantages of this new comprehensive approach.

When Dr. Williamson arrived in Pensacola, no radiologist offered comprehensive breast care services to the women of Pensacola (App. I-12 at ¶¶ 6-9; App. III at 9, 334-37, 646-47, 842-44). Accordingly, Dr. Williamson decided to open a clinic to provide this much needed service to this under-served market.

Based on conversations with several ob/gyns who would likely be her referral base, Dr. Williamson feared that the defendant hospitals would be hostile to her plans for a clinic. (App. II-34 at 134-40.) Dr. Williamson decided to seek the advice of Dr. Whitcomb, Sacred Heart's medical director. Dr. Whitcomb's advice took the form of a warning: "If you open, we are going to close you one way or the other. We are going to blackball you." (App. II-34 at 134).

Dr. Williamson ignored Sacred Heart's warning and opened her clinic in May, 1984. *Id.* at 39; App. III at 3, 4. The clinic was an immediate success. Dr. Williamson was able to establish referral relationships with a number of primary care physicians, (App. II-34 at 165-74; App. I-9 at ¶¶5-6; App. I-1 at ¶34, and Figures 1, 3, 4, 6, 7 and 9).

The Conspiracy is Formed

Sacred Heart made good on its threat. Shortly after Dr. Williamson's clinic was opened, the defendants began their conspiracy to eliminate Dr. Williamson's practice. The conspiracy was accomplished by a two-pronged attack on the clinic's lifeline, its referral base. The clinic depended on two major sources for referrals, referrals from physicians and self-referrals by the patients themselves (App. I-1 at ¶¶ 34-39). To attack Dr. Williamson's base of self-referrals, the defendants acted to deny her full staff privileges at Sacred Heart and Baptist (R. 12-311 at 18-42; 92-119). This denial had the effect of preventing Dr. Williamson from rendering complete care to

her patients.[4] The denial had the equally harmful effect of preventing her from participating in a number of managed care programs including the Blue Cross/Blue Shield HMO, known as Health Options (App. II-34, 78-79, 85, 94-95, 216-18, 1204, 1478-80).

Dr. Williamson's physician referral base was attacked directly by both Baptist and Sacred Heart through contracts between the hospitals and the referring physicians that had the effect of diverting referrals away from Dr. Williamson the hospitals (R. 12-311 at 49-64).

While attacking her referral base, Sacred Heart and Baptist responded to Dr. Williamson's new style of care by opening their own women's centers. Despite Dr. Williamson's two-year head start and high level of service, both of these institutions quickly overtook Dr. Williamson in the market and soon were performing many more breast exams than Dr. Williamson (App. I-1 at ¶¶36-37).

The Conspiracy Eliminates Competition From Independent Radiologists

The effect of the conspiracy has been to stifle competition from independent radiologists. Between the time Dr. Williamson opened her clinic and the close of discovery, twenty-one new radiologists had come to Pensacola. In an era when independent clinics are otherwise booming, and despite low barriers to entry, not one of the radiologists opened or

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[4] For example, Dr. williamson often had patients that needed biopsies performed through a needle-placement procedure. Sacred Heart would not accept Dr. Williamson's needle placement patients in part because she did not have staff privileges. (R. 12-311 at 64-70)

joined an independent radiology clinic. All joined traditional hospital-based practices, most with the defendants (R. 12-311 at 129-39).

Dr. Williamson Files Suit

Finding herself cut off from staff privileges at Scared Heart and Baptist and from membership in Pensacola's largest HMO and watching her established referral base disappear, Dr. Williamson brought a four-count complaint against the defendants. Dr. Williamson sued the two hospitals who denied her staff privileges, Sacred Heart Hospital of Pensacola and Baptist Hospital, Inc. She also sued Pensacola Radiology Consultants, P.A., ("PRC") the radiology group that operated Sacred Heart's competing breast clinic and its chairman, Dr. Albert A. Post. Finally, she sued Health First Network, Inc., the group of physicians that denied Dr. Williamson access to the Pensacola Blue Cross/Blue Shield HMO, and Health First's president, Dr. Keith T. Shearlock. Dr. Williamson alleged that all of the defendants engaged in a conspiracy in violation the Sherman Act and that Sacred Heart along with PRC and Dr. Post tortiously interfered with her business relationships with referring physicians and her patients (R. 1-2).[5]

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[5] Counts I-III are brought under Section 1 of the Sherman Act. Count I attacks the actions Sacred Heart and PRC took to frustrate Dr. Williamson's ability to compete (R. 1-2 at ¶55). Count II addresses just those actions taken by Baptist against Dr. Williamson (R. 1-2 at ¶ 64). Count III alleges a conspiracy among all the defendants. Count IV is brought under state law. Dr. Williamson alleges that Sacred Heart, PRC and Dr. Post tortiously interfered with Dr. Williamson's established business relationships with her patients and referral physicians (R. 1-2 at ¶73).

Proof of Conspiracy

Dr. Williamson proved the conspiracy below by showing that the defendants undertook parallel actions that made no economic sense in the absence of a conspiracy. Sacred Heart and Baptist each denied Dr. Williamson full staff privileges and Health First denied Dr. Williamson membership in the local Blue Cross/Blue Shield HMO despite substantial evidence that each had strong financial incentives to deal with her in the absence of a conspiracy.[6] This evidence is summarized very briefly below.[7]

Sacred Heart. Dr. Williamson first applied for staff privileges at Sacred Heart in the Department of Radiology. Sacred Heart had a substantial incentive to grant her application. Dr. Williamson acts as the primary care physician for thousands of Pensacola women. Like any primary care physician, she performs the same gatekeeper functions in determining when referrals to specialists are needed. Although she does not generally refer patients directly for admission to any hospital, she refers numerous patients to physicians who have staff privileges at these hospitals. Thus, her referral decisions will have a very substantial impact on Sacred Heart or Baptist's admissions. By bringing Dr. Williamson into their circle of physicians, both Sacred Heart and Baptist could maximize their chances that her patients would be admitted to

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[6] There is no dispute that the defendants had an opportunity to conspire. See A45.

[7] The record on appeal is extremely voluminous in this case, containing thousands of documents. The parties' briefs on the issues of summary judgment totalled over 500 pages. Dr. Williamson's discussion of the facts and issues in this brief is necessarily compressed.

their respective hospitals (R. 12-311 at 94-95; App. I-1 at 16-19; App. I-14 at 5-15).

Despite this incentive, Sacred Heart argued that it could not approve of staff privileges in the Department of Radiology because it had an exclusive contract with PRC. There was evidence that Sacred Heart and PRC's reliance on the exclusive contract in radiology was a pretext. The contract did not require the hospital to reject Dr. Williamson's request for limited privileges.[8] Evidence exists that she was qualified to do everything she requested and that none of her requests were within the exclusivity provisions of the contract. As the district court noted, Sacred Heart accommodated other physicians in spite of the exclusive contract (A29; R. 16-354 at 81-83).

Refused privileges in radiology, Dr. Williamson applied for privileges in the department of internal medicine. There is substantial evidence that the hospitals' justifications for denying her privileges were a pretext. To begin with, there was evidence that Dr. Williamson was superbly qualified and had the training to satisfy the minimal requirements of privileges in internal medicine (R. 12-311 at 22-24; 27-31). The Credentials Committee agreed and suggested that the hospital's refusal to grant her privileges was anticompetitive. *Id.*

When it became apparent that Dr. Williamson's application for privileges in internal medicine might succeed, the hospital administration *changed the medical staff by-laws* in a manner completely outside the usual amendment process. This change rendered her technically unqualified. *Id.* at 22-28.

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[8] Dr. Williamson specifically requested limited privileges that would not interfere in any way with the procedures reserved to PRC.

Later, at the "fair hearing" mandated by the by-laws, the hospital refused to accept Dr. Williamson's evidence that she was qualified and that her application would be in the best interest of the hospital. *Id.* at 31-32.

In addition to denying Dr. Williamson staff privileges, Sacred Heart barred certain of Dr. Williamson's needle placement patients from treatment at the hospital.[9] One of Sacred Hearts own physicians described the hospital's justifications as "silly." *Id.* at 69.

None of those actions are explainable if one accepts Dr. Williamson's proof that Sacred Heart, acting unilaterally, had every incentive to deal with her.

Baptist. Baptist conceded that it had the same economic incentive to grant Dr. Williamson privileges. Yet, Baptist delayed sending Dr. Williamson an application for privileges for six months while it drafted a contract to ensure her exclusion. When Dr. Williamson finally pried an application form from Baptist, Baptist denied privileges to Dr. Williamson based on a so-called exclusive contract whose contours even Baptist concedes were vague and confusing.[10] Curiously, Baptist invoked the exclusive contract despite the Baptist radiology

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[9] Occasionally, Dr. Williamson's examination will reveal a lesion too small to be found easily by the surgeon. The solution is to insert a Kopan's needle which contains a very thin hook-wire into the breast. After properly positioning the needle so that it isolates the suspicious area, the radiologist removes the needle, leaving the hook-wire attached to or very near the lesion. The surgeon need only follow the wire to find the lesion (App. I-8 at ¶ 18; I-13 at ¶ 13.

[10] Baptist administrators, and even members of the radiology group, did not know that the contract was exclusive.

group's lack of objection to her privileges. In other words, Baptist acted to tie its own hands by a restrictive contract in the absence of any request from the radiology group for additional exclusivity. *Id.* at 34-42. Dr. Williamson's treatment at the hands of Baptist was unusual. The evidence showed that other physicians participated in various aspects of radiology at Baptist despite the "exclusive contract." *Id.* at 36. Finally, when Baptist finally granted provisional privileges to Dr. Williamson, it indicated that she would never graduate to full privileges based on another "rule" whose origin was uncertain. Without full privileges, Dr. Williamson remained barred from Pensacola's largest HMO. *Id.* at 39-42.

Health First. As to defendant Health First, Dr. Williamson showed through internal Health First documents that Health First was concerned about the high cost of radiology referrals and laboratory services. Dr. Williamson offered to solve that problem by offering her services at a lower cost then currently being paid by the HMO. Despite its obvious economic incentive to admit Dr. Williamson, Health First denied her application for reasons that make no economic sense in the absence of a conspiracy. *Id.* at 42-44.

Direct Attack on Physician Referrals

Dr. Williamson also had evidence that defendants entered into improper and perhaps illegal contracts to divert referrals from her clinic to Sacred Heart, PRC and Baptist. Sacred Heart conceded that it was improper to enter into contracts to divert referrals for any reason other than quality of care (App. II-13 at 36-37). Yet, Dr. Williamson had substantial evidence that such diversions occurred. One physician admitted the diversion (App. II-13 at 36-37, 43). Others testified they

were pressured by the hospital to divert referrals. Contracts were placed into evidence unambiguously requiring a diversion of referrals (App. III at 707 ¶ 4(i); 706 ¶ 4E).[11]

Sacred Heart and PRC kept careful records of physicians referrals to competitors. Sacred Heart policed referrals by direct visits to the referring physician's office (App. I-10). Another Sacred Heart physician gave a sworn statement shortly before his death in which he testified that physicians who did not comply with the hospital's wishes on referrals were threatened with being blackballed (R. 12-311 at 60-61).

Statistical evidence proves that the diversion was extremely successful. Dr. Williamson had what the district court called "dramatic" evidence of a decrease in new referrals from Sacred Heart physicians (A32). Referrals from Baptist physicians under contract with Baptist showed virtually no growth while Baptist physicians not under contract showed substantial numbers of new referrals to Dr. Williamson.

None of the physicians had convincing explanations for their decision to dramatically reduce their new referrals to Dr. Williamson. None had any concerns over her quality of care. Indeed, most continued to send their friends and relatives to her while their "ordinary" patients went to Sacred Heart (R. 12-311 at 49-63.

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[11] Sacred Heart had very substantial leverage in these contracts. For example, in one contract, any breach of any covenant in the contract resulted in the physician's loss of privileges to practice at Sacred Heart (App. III at 685-689).

Summary Judgment

The defendants moved for summary judgment, alleging that Dr. Williamson had no evidence to support her conspiracy charges (R. 10-291; 10-293; 10-296). After reviewing the voluminous submissions of the parties, the district court *denied summary judgment* as to every defendant save PRC and Dr. Post (A16). In a detailed 43-page order, the court reached the conclusion that Dr. Williamson had both direct and circumstantial evidence supporting the existence of the conspiracy. As to Dr. Post and PRC, the court concluded that Dr. Williamson had some evidence of conspiracy, but not enough to get her case before a jury (A41-44).

The remaining defendants filed motions for rehearing, rearguing the same facts already presented to the court (R. 14-333, 337, 339). The court granted rehearing and this time entered summary judgment as to all of the defendants (A54). Curiously, the court provided no explanation for the reversal of its previous decision. In the second order, after analysis of the same set of facts, the court held that Dr. Williamson had not demonstrated a material factual dispute on the issue of conspiracy. *Id.*

The Eleventh Circuit affirmed summary judgment as to all of the defendants. The opinion largely adopts the reasoning of the district court's second opinion (A3).

Basis for Jurisdiction Below

This district court had jurisdiction pursuant to 28 U.S.C. §1331. The Eleventh Circuit had jurisdiction pursuant to 28 U.S.C. §1291.

WHY THE WRIT SHOULD BE GRANTED

The Eleventh Circuit's opinion is the latest example of a conflict brewing among the circuits over the analysis of antitrust conspiracy claims on summary judgment. Dr. Williamson presented competent evidence on each element necessary for proof of conspiracy. Yet, the Eleventh Circuit misread this Court's *Matsushita*[12] decision to require Dr. Williamson not only to create a fact issue on each element but actually to prevail on one or more of these elements to survive summary judgment. In doing so the court intruded on the jury's fact finding province. Once Dr. Williamson submitted evidence supporting a reasonable inference of conspiracy, it was the jury's function to weigh the evidence and choose between the inferences drawn by Dr. Williamson and the defendants.

The opinion below also misapplies this Court's rulings on standing in antitrust actions. The Eleventh Circuit ruled as a matter of law that the profit made by Dr. Williamson and her clinic eliminates their standing to sue under the antitrust laws. In doing so, the court overlooked substantial evidence that the defendants' conduct severely impacted the market and damaged Dr. Williamson. By ruling against Dr. Williamson as a matter

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[12] *Matsushita Electric Industrial Company v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

of law, the court created a conflict with several other circuit courts of appeals.

Granting certiorari in this case will permit resolution of these conflicts and ensure that private damage causes of action remain a viable remedy to physicians aggrieved by anticompetitive behavior. Certiorari will also permit this court to illustrate the appropriate scope of the antitrust laws in disputes between physicians and hospitals. The decision below is evidence of lingering hostility in the lower courts, correct in many cases, but misplaced in this case, towards such lawsuits. This Court should intercede, as it has twice before in staff privilege actions, to confirm that the antitrust laws do not impose higher standards of proof on medical professionals who are the victims of anticompetitive conduct.

This Court Should Grant Certiorari To Resolve Conflict Among the Circuits In The Analysis of Conspiracy Claims on Summary Judgment

This Court has recognized that "[o]nly rarely will there be direct evidence of an express agreement" in conspiracy cases. *Local Number 189 Amalgamated Meat Cutters v. Jewel Tea Company*, 381 U.S. 676, 720 (1965). Thus, Dr. Williamson, like most antitrust plaintiffs, relied on circumstantial evidence. Such evidence is admissible and often dispositive. *See* cases collected in ABA Antitrust Section, Antitrust Law Developments (3d Edition 1992) at 4 n.24.

The first step in proving a conspiracy is to show that the defendants have engaged in parallel conduct. Here Sacred Heart, Baptist, and Health First acted to exclude Dr Williamson from their respected institutions. Next, plaintiffs must show

some plus factor indicating that defendants' parallel conduct resulted from a conspiracy. To do this plaintiff must show that defendants had a non-legitimate motive for entering into a conspiracy. That is, plaintiffs must show that, by acting together, the defendants can achieve an economically beneficial result that would be difficult or impossible to achieve acting separately. *Matsushita*, 475 U.S. at 587-88; *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1232 (3d Cir.), *cert. denied*, 114 S. Ct. 554 (1993).

Finally, Plaintiffs must present evidence that tends to exclude the possibility that defendants acted unilaterally. Most commonly this is shown by evidence that defendants acted contrary to their economic interest. *Matsushita*, 475 U.S. at 587-88. Alternatively, plaintiffs may show that defendants' justifications for their conduct were pretextual. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Company*, 472 U.S. 284, 296 n.7 (1985); *Alvord-Polk, Inc. v. F. Schumaker & Co.*, 37 F.3d 996, 1012 (3d Cir. 1994); *Big Apple BMW v. BMW of North America*, 974 F.2d 1358 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1262 (1993). Other factors, such as proof of an opportunity to conspire are helpful but not necessarily dispositive. *See* cases collected in ABA Antitrust Section, Antitrust Law Developments (3d ed. 1992) at 7 n.47.

Dr. Williamson created fact issues on all of these points. There is no dispute that the defendants met frequently and had an opportunity to conspire (A45). There is also a plausible motive to conspire. By acting together, the two hospitals, which comprised nearly 70% of the market, could severely inhibit her referrals by keeping her out of several managed care organizations and by directly attacking her physician referral base. As discussed below, had they been acting individually,

the hospitals each had a substantial economic incentive to form a relationship with Dr. Williamson (R. 12-311 at 91-97).

Dr. Williamson also had substantial evidence that the justifications asserted by the defendants were purely pretextual. At Sacred Heart, when Dr. Williamson applied for privileges in radiology, the hospital asserted its exclusive contract with PRC even though the contract did not apply to her request. When she switched her application to the department of internal medicine, the hospital changed its bylaws to keep her out. The justifications for barring her needle placements patients from the hospital were described as "silly" by one Sacred Heart physician. At Baptist her application was inordinately delayed. Baptist then denied Dr. Williamson staff privileges in radiology for three years even though there was no written exclusive contract with its radiology department and in the absence of any objection by its radiologists. Health First rejected Dr. Williamson's application despite the fact that she offered high quality services at low prices at the same time Health First's internal documents were blaming its lack of profitability on the high cost of referral care, including radiology. Instead of finding a way to benefit from her high quality services and lower prices, Health First did everything it could to keep her out. Viewing this evidence of pretext, the district court in both orders concluded that there were fact issues on whether the defendants were acting in the best interest of patient care (A46, 120).

The Eleventh Circuit ignored this evidence and focused on one element: whether the defendants had an economic incentive to deal with Dr. Williamson. Dr. Williamson submitted plausible evidence that they did. By establishing a relationship with Dr. Williamson, each hospital stood a

significant chance that her patients would choose that hospital for other hospital services. To deny her privileges would force Dr. Williamson to form her referral relationships with physicians at the competing hospital. There was no downside to granting her privileges. Even though Dr. Williamson was a competitor, granting her privileges would not concede a single patient to her in the competition between the hospitals' breast clinic and Dr. Williamson's clinic.

Indeed, at one point in the litigation Baptist conceded that granting Dr. Williamson's staff privilege application was in the hospital's economic interest:

> By granting her these privileges, Baptist could achieve the economic benefit of patient referrals from Dr. Williamson while both preventing the hospital from being exposed to unnecessary liability and maintaining its standard of quality health care.

R.10-291 at 31.[13]

On summary judgment, Sacred Heart and Baptist argued that the hospitals had no incentive to accommodate her because they operated radiology clinics in competition with Dr. Williamson. The Eleventh Circuit reached the simplistic conclusion that granting her privileges would be providing aid to a competitor. This conclusion ignores the fact that denial of privileges (without the assurance of cooperation of the other

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[13] Thus, the district court concluded in its first order that genuine issues of fact existed with respect to the defendants' incentive to deal with Dr. Williamson (A46). Other courts have reached similar conclusions. *See Weiss v. York Hospital*, 745 F.2d 786, 789 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985).

hospital) would simply drive Dr. Williamson and her patients to the competing hospital. Regardless of the competition she provided to the hospital's radiology group, the hospitals still had a strong economic interest in capturing her patients.

Clearly, as the district court noted in its first order, the issue of the hospitals' incentive to deal with Dr. Williamson was a factual issue that should have been presented to the jury. However, the Eleventh Circuit's opinion below misreads *Matsushita* to require Dr. Williamson to win her case before it is even submitted to the jury. The Eleventh Circuit resolved the issue of the defendants' motive to conspire against Dr. Williamson by weighing the evidence and ruling that there was no economic incentive for the hospital to deal with her. According to the Eleventh Circuit, the fact that the defendants submitted a plausible argument supporting their claim that they acted unilaterally ended the analysis.

Unfortunately, the Eleventh Circuit is not the only circuit to misread *Matsushita* in this way. The Fourth, Eighth and Tenth Circuits have also granted summary judgments to defendants after weighing the parties' conflicting evidence on the defendants' motives. *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696 (4th Dir. 1991) (en banc), *cert. denied*, 502 U.S. 1074 (1992); *Lovett v. General Motors Corp.*, 998 F.2d 575 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1058 (1994); *Gibson v. Greater Park City Co.*, 818 F.2d 722 (10th Cir. 1987).

For example, in *Lovett*, the plaintiff was a GM dealer with a deserved reputation as a price cutter. Plaintiff's allocation of cars from GM was significantly curtailed after GM received complaints from other local dealers. Plaintiff had significant evidence of conspiracy yet suffered summary

judgment after the circuit court weighed plaintiff's evidence against GM's evidence that it was acting in its economic interest. Although plaintiffs had evidence that GM's actions were not in its interests, the fact that GM submitted a plausible explanation was dispositive. 998 F.2d at 580.

In *Gibson*, the Tenth Circuit conducted a similar analysis and reached a similar conclusion, rejecting plaintiff's conspiracy claims because the evidence was ambiguous. 818 F.2d at 724-25. In *Oksanen*, the court accepted the defendants' justifications at face value rejecting the plaintiff's evidence to the contrary over the objections of the dissenting judges who were concerned that the court had imposed too high a burden on antitrust plaintiffs facing summary judgment. 945 F.2d at 706-08; 714-16.

These cases all misread *Matsushita's* requirement that plaintiff present evidence that tends to exclude the possibility of unilateral action. According to those decisions, if the defendants and plaintiffs each submit evidence on the defendant's motives, the evidence is "ambiguous" and cannot exclude the possibility of unilateral action.

These cases conflict directly with recent decisions out of the Third and Ninth Circuits where the courts refused to weigh between competing inferences. In these cases, so long as the plaintiff has evidence that calls into question the justifications forwarded by the defendants, the job of weighing this evidence remains with the jury.[14] As the Ninth Circuit explained:

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[14] *See Petruzzi's IGA Supermarket, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1231 (3d Cir.) (defendant not entitled to summary judgment merely by forwarding an economic theory justifying its conduct), *cert. denied*, 114 S.Ct. 554 (1993); *Big Apple BMW v. BMW of North America*, 974 F.2d

> Nor do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct. Such an approach would imply that circumstantial evidence alone would rarely be sufficient to withstand summary judgment in an antitrust conspiracy case. After all, circumstantial evidence is nearly always evidence that is plausibly consistent with competing inferences.

Arizona v. Standard Oil Co. of California, 906 F.2d 432, 439 (9th Cir. 1990), *cert. denied*, 500 U.S. 959 (1991).

The analysis of *Petruzzi*, *Big Apple*, and *Standard Oil* appears to conform with this court's recent decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992). *Kodak* emphasizes that *Matsushita* does not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. 112 S. Ct. at 2083.

The Eleventh Circuit's decision in this case along with decisions such as *Lovett* show that, even after *Kodak*, there is substantial need for clarification as to the district court's role in assessing the adequacy of the plaintiff's conspiracy evidence.[15]

1358 (3d Cir. 1992) (refusing to weigh competing economic theories; (summary judgment denied because plaintiffs had evidence that defendants' explanations were implausible), *cert. denied*, 113 S.Ct. 1262 (1993).

[15] Recent district court decisions after *Kodak* show a similar misunderstanding of *Matsushita*. *E.g.*, *Ehredt Underground, Inc. v. Commonwealth Edison Co.*, 848 F.Supp. 797, 809 (N.D. Ill. 1994); *Willman v. Heartland Hosp. East*, 836 F.Supp. 1522 (W.D. Mo. 1993); *aff'd*, 34 F.3d

This case provides an excellent vehicle to address those issues and resolve this conflict.

Being Profitable Does Not Eliminate Standing To Sue Under the Antitrust Laws

The Eleventh Circuit ruled that Dr. Williamson has no standing to sue under the antitrust laws because her clinic increased its profits during the course of the litigation. This theory, if accepted, would severely impair the viability of private damage causes of action as a remedy for violations of the antitrust laws.

There is no support for the Eleventh Circuit's holding. To prove standing, Dr. Williamson must show that the defendants' anticompetitive conduct caused her to suffer damages. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Here, there was substantial evidence that the defendants anticompetitive acts stifled competition in independent radiology in Pensacola. Twenty-one new radiologists came to Pensacola after Dr. Williamson opened her clinic and all joined hospital-based practices. None of these radiologists opened a practice in competition with the hospitals other than Dr. Williamson because of the conduct of the defendants.

Certainly, Dr. Williamson suffered injury to her business or property as a result of the defendants' conduct. As the district court notes in its first order, there was "dramatic"

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605 (8th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3689 (1995); *Caldwell v. American Basketball Association, Inc.*, 825 F.Supp. 558, 572 (S.D. N.Y. 1992).

evidence that patients had been diverted from her improperly as a result of the defendants' conduct (A32). In the meantime, while Dr. Williamson made modest gains in the marketplace, both Baptist and Sacred Heart experienced growth in the breast care market far beyond that gained by Dr. Williamson. *See Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440, 1448 (9th Cir. 1988) (increase in defendant's income relevant to prove injury).[16] The evidence suggests that many of the procedures performed at Sacred Heart and Baptist would have been performed at Dr. Williamson's clinic if patients had not been diverted from her as a result of the conspiracy. The decision below conflicts with numerous cases in other circuits permitting profitable plaintiffs to seek relief under the antitrust laws.[17] These cases suggest that profitability, as a matter of law, is no absolute indicator of competitive injury.

In the final analysis it is not for the defendants to say how much Dr. Williamson or her clinic would or should have made. That decision was for the market to decide. Whether

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[16] During the same period of time, Dr. Williamson's clinic's revenue grew by 34.7%, Sacred Heart's expanded its breast care revenue by 124%. Although Dr. Williamson was the first in town to focus on this market, Baptist and Sacred Heart soon far surpassed her market share. During the twelve months ending December, 1989, Dr. Williamson performed 2,029 bilateral mammograms. During the same period of time, Sacred Heart performed 4864. Baptist did even better. In one twelve month period ending in October, 1989, Baptist performed 5,116 bilateral mammograms to Dr. Williamson's 1953 (App. I-1 at 37).

[17] E.g., *Wilk v. American Medical Association*, 895 F.2d 352, 360 (7th Cir.), *cert. denied*, 496 U.S. 927 (1990); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983); *Litton Systems, Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983); *cert. denied*, 464 U.S. 1073 (1984); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978).

Dr. Williamson suffered competitive injury despite her increased profits was a factual issue for the jury.

This Court should grant certiorari to confirm that a plaintiff need not be in bankruptcy to successfully sue under the antitrust laws.

The Proper Role of the Antitrust Laws in Privilege Disputes

As evidenced by the bizarre procedural history in this case, issues of conspiracy and staff privilege actions have long troubled the courts.[18] However, most doubts on any of the issues typically raised by such cases have been resolved consistently against the physician. The courts have been hostile to antitrust actions brought on behalf of physicians and the decisions below are reflective of this hostility.[19] In many of these cases, this hostility is justified. Disputes over a physician's quality of care should not be resolved under the Sherman Act. However, the abuse of the antitrust laws by some plaintiffs should not result in increased barriers that

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[18] One example is the current split among the circuits over whether the medical staff is capable of conspiracy with the hospital. The Ninth and Eleventh Circuit have held that the medical staff may conspire with the hospital. *Todorov v. DCH Health Care Auth.*, 921 F.2d 1438 (11th Cir. 1991); *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440 (9th Cir. 1988). The Third, Fourth, Sixth, and Seventh have held to the contrary. *Nanavati v. Burdette Tomlin Mem. Hosp.*, 857 F.2d 96 (3d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989); *Oksanen v. Page Mem. Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc), *cert denied*, 502 U.S. 1074 (1992); *Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d 605 (6th Cir. 1990), *cert denied*, 502 U.S. 952 (1991); *Pudlo v. Adamski*, 2 F.3d 1153 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 879 (1994).

[19] See cases collected in Miles, Healthcare and Antitrust Law § 10.02 at 10-24.

eliminate legitimate claims as well. This case is not a dispute over Dr. Williamson's quality of care. Rather it is an antitrust claim in the classic sense: Dr. Williamson, the owner of an independent business, argues here that the two dominate providers of services in her market have conspired to stifle competition from her business and other independent businesses like hers. Thus, this case presents an excellent vehicle for addressing proof of conspiracy in staff privilege actions because it permits the court to highlight the appropriate use of the antitrust laws in disputes between physicians and hospitals.

This Court has been required to intercede on two previous occasions to correct circuit opinions imposing additional burdens on physician antitrust plaintiffs. In *Summit Health* this Court rejected decisions by the circuit courts imposing higher burdens in proving interstate commerce in staff privilege actions. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991). In *Patrick*, this Court reversed circuit decisions providing immunity under the state action doctrine in staff privilege actions because the conduct under review was not actively supervised by the state. *Patrick v. Burget*, 486 U.S. 94 (1988).

The Eleventh Circuit's opinion indicates that this Court's guidance is needed yet again. As a result of the hostility to physician suits against hospitals, physicians have only very rarely prevailed in such actions.[20] By granting certiorari this Court can emphasize that such hostility, misplaced in this case, should not result in additional burdens on summary judgment that will eliminate meritorious claims.

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[20] See Miles, Health Care and Antitrust Law, § 10.01 at 10-8 and cases cited therein.

CONCLUSION

This case raises important issues concerning proof of conspiracy and standing. This Court should grant certiorari to resolve these conflicts and ensure that the antitrust laws remain a viable remedy to all those aggrieved by anticompetitive conduct.

Respectfully submitted,

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